No. 13,313

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co.,

Appellants,

vs.

A. E. OWENS, FERN OWENS, and R. F. OWENS, co-partners, doing business as Owens Brothers,

Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

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FACTS.

The facts involved in this case are most succinctly set forth in the opinion of the trial court (Tr. 34) and in its Findings of Fact (Tr. 41). Since appellants have relied heavily upon factual issues in their brief, a rather detailed analysis of the evidence will be set forth herein despite the well established rule of law that "In reviewing the sufficiency of the evidence to

sustain the findings, the Appellate Court will give the strongest probative force to the evidence in support thereof and will consider all reasonable inferences to be drawn therefrom, viewing the evidence in the light most favorable to the prevailing party and to the findings made." 5 *C.J.S.,* 409, 410; *Key v. Polk,* 63 F. 2d 358; *Metropolitan Casualty Insurance Co. of N. Y. v. Hoage,* 72 F. 2d 175; *Colby v. Riggs National Bank,* 92 F. 2d 183; *Nygard v. Dickinson,* 97 F. 2d 253.

The appellants purchased the war surplus vessel TP 100 in the spring of 1946 for $10,000.00. (Tr. 311, 315.) In February, 1947, the vessel was run from Alaska to Seattle, Washington, for the purpose of having it repaired, but on the way south, it ran into a rock and had to be backed off. This collision resulted in the complete demolition of the forefoot, substantial damage to the lower portion of the stem, broken planks, and substantial damage to the keel. In addition, the stem iron was almost torn loose. (Tr. 199, 200, 96, 97, and Exhibits 7 and 8.) The damage was below the water line and while the forward portion of the vessel was open to the sea, a water tight bulkhead prevented the water from pouring into the remainder of the vessel.

After this accident, appellants decided to sell the vessel rather than repair it. Mr. A. E. Owens, one of the appellees, was in Seattle, Washington, at the time and was interested in procuring a tugboat for use in connection with his logging operations in Alaska. Upon ascertaining that the appellants wished to sell their

vessel, Mr. Owens contacted them and was shown the vessel. The appellants were informed that he wished to secure a vessel for use in connection with his logging operations. (Tr. 16, 116, 407.) Mr. Owens was shown the boat and made a cursory inspection of it. The appellants represented to him that the vessel was in good condition except for one scored crankpin, also referred to as a scored bearing or journal (Tr. 17, 74, 244, 297, 298, 319) and a bruised forefoot. The appellants also made the affirmation of fact that the vessel had struck a log on the way south which was the alleged cause of the "bruised forefoot". (Tr. 31, 74, 414, 415.) Appellants also told Mr. Owens that the vessel was not leaking (Tr. 74, 244, 414) and that an expenditure of $5000.00 would put the vessel in good condition. (Tr. 17, 74, 297.) This last representation was in effect admitted by the pleadings wherein appellants admitted "* * * that an allowance of $5000.00 was made to plaintiffs by defendants on the purchase price of the vessel by reason of the defects noted in defendants' answer." (Tr. 11.)

Relying on these representations, Mr. Owens agreed to purchase the vessel on behalf of the appellees for a full purchase price of $25,000.00. Since appellants had not yet received a bill of sale for the vessel, a written agreement was entered into for the purpose of providing for immediate transfer of possession of the vessel pending receipt of a bill of sale from the army which was prerequisite to documentation. This agreement (Tr. 78-82) makes no reference to the condition of the vessel.

Shortly after April 1, Mr. Owens was given possession of the vessel which was moved for him by the appellants to another dock. At the time that Mr. Owens had been shown the vessel by the appellants, it was not possible to see more than six inches below the water line so that the extensive damage to the bow could not be detected. One piston had been removed from the cylinder and was made fast to the motor block, but no detailed inspection of the engine was made by Mr. Owens.

Mr. Owens arranged to have the repairs made which appellants' representations had indicated would be necessary to the vessel. An inspection of the engine was made by Ted Engstrom, a mechanical expert of the Fairbanks-Morse Company, whose deposition was introduced into evidence in the case. Instead of the damage being restricted to one scored crankpin, Mr. Engstrom discovered that all main bearings were either completely wiped out or the babbitt was cracked with pieces missing; all main bearing journals were scored and approximately ⅛" under the original shaft diameter. The water pump was plugged. Teeth were missing from the drive gear and the gear was beyond further use. The fresh and salt water pumps' shafts were bent and the bearings were beyond further use. The crankshaft itself was distorted 3/64ths of an inch, being warped so as to be unusable. The oil columns were packed solid with babbitt the full length, and the lower base of the engine, due to intensive heat, had been warped. (Tr. 433, 434.) This damage to the engine was only determined after the engine was torn

down and could not have been detected by casual inspection such as that made by Mr. Owens.

The full extent of the damage to the engine was not ascertained until the crankshaft had been removed and placed on a lathe. As soon as the crankshaft was removed sometime in May of 1951, the vessel was removed to a dry dock, at which time the substantial demolishment of the bow was first ascertained. On May 17, very shortly after the nature of the damage to the vessel had been ascertained, Mr. Owens had his attorney write to the appellants notifying them of the substantial damage to the vessel, and further of the fact that the vessel had been misrepresented to Mr. Owens, who was looking to the appellants for the damages caused by the misrepresentations. (Tr. 348-350.) Prior to the time that the substantial damage to the vessel was ascertained, the down payment of $5000.00 had been submitted to appellants and appellees had made a note and mortgage with the First National Bank of Anchorage for the balance of the purchase price. (Tr. 412, 413.)

At the time that the vessel was purchased, Mr. Owens agreed to loan to the appellants an 18 ft. steel lifeboat which appellants agreed that, while on their way to Seldovia, Alaska, they would return to appellees at their logging camp near Ketchikan, Alaska. This lifeboat was never returned and no answer was ever made to appellees' demand for its return. (Tr. 342, 354.) The court found the value of the lifeboat to be $500.00, and testimony in regard to its value varied from $300.00 to $400.00 (Tr. 281, 282) to $1000.00. (Tr. 119.)

Itemized bills in regard to the cost of repair of the vessel were submitted as follows:

Wilson Machine Works, smoothing bearing		$ 300.00
Fairbanks-Morse & Company for new crank shaft and insurance		6,056.66
Fairbanks-Morse & Company for work on engine		6,085.19
Diesel Engineering Co., tail shaft and stuffing box		1,222.04
Canal Electric Co., repairing batteries		632.42
Pacific Electric & Machine Co., repairing forefoot, stem, keel and planks		8,390.03
Board for Owens' employees while working on repairs of vessel		700.00
Employees of Owens Brothers for work done on vessel:		
Blanchard	$1,400.00	
Moore	232.57	
Moore	222.45	
Tucker	292.90	
Tucker	289.50	
W. E. Eaton	219.26	
W. E. Eaton	245.20	
Jacobsen	92.45	
Jacobsen	172.50	
Total wages		3,166.83
Four trips of A. E. Owens from Alaska to Seattle in connection with repairs necessitated by misrepresentations		934.80
TOTAL		$27,487.97

The court found that $21,798.68 was necessarily expended in order to repair the vessel to the warranted condition and so that it would be usable for the purposes of Mr. Owens' business. The court refused to allow the amounts expended for a new tail shaft, stuffing box, battery plates, copper painting the vessel, and the work performed by Mr. Owens' employees, other than Mr. Blanchard. Since both parties admitted that appellants represented that the cost of repairing the damage to the vessel would be $5,000.00, this sum was deducted from the sum of $21,798.68, the court finding that the excess cost of repairs due to the misrepresentations of the appellants was $16,798.68. In addition, due to the substantial damage to the vessel, it took 105 days to repair it so that it would be in working condition. This was approximately 75 days longer than it would have been necessary to take in repairing the vessel had it been in the condition warranted, and Mr. Owens testified that, had he been able to use the vessel, he would have been able to have towed five and a half million feet of logs, for which he would have received the sum of $4.00 a thousand. Approximately 50% of that sum would have been profit, had he been able to use the vessel, amounting to $11,000.00. (Tr. 116, 117.) The court reduced this figure for loss of profit to the sum of $7,920.18, after reducing the delay period by the time estimated by the court to be spent on general overhaul, in addition to that necessary to place the vessel in the condition warranted, and after further reducing the delay period by the ten days spent in making a trip to San Francisco to pick up a barge and tow it to Alaska.

ARGUMENT.

I.

THERE WAS AN IMPLIED WARRANTY THAT THE VESSEL WAS FIT FOR USE BY APPELLEES IN THEIR LOGGING BUSINESS, WHICH WARRANTY WAS BREACHED.

Since the sale of the vessel involved in the subject appeal was consummated in the State of Washington, it is agreed that the substantive law of the State of Washington applies. Washington, like Alaska, has adopted the Uniform Sales Act which provides in part as follows:

> "*Implied warranties or conditions as to quality or fitness.* Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract, to sell or a sale, except as follows:
>
> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose * * *" Remington Revised Statutes, Section 5836-15.

As indicated in the statement of the facts, and as found by the District Court, appellants were notified of the purpose for which the appellee required the vessel. Consequently, there was an implied warranty that the vessel, with the exception specified, was fit to be used in the logging business. Mr. A. E. Owens testified (Tr. 116):

"Q. Did you inform Mr. Anderson when you originally negotiated the purchase of the vessel just what you wanted the vessel for?

A. That is right.

Q. What did you tell him in that regard?

A. That we were logging and wanted it to tow logs."

Similarly, Orville H. Mills stated in his deposition (Tr. 407):

"A. Mr. Owens, after introducing Mr. Anderson, outlined that Mr. Anderson had an Army Tug passenger ship for sale; that Mr. Anderson had shown the vessel to Mr. Owens; that Mr. Owens was in the market looking for a tug in connection with his logging operations out at Ketchikan, Alaska, for particular duty in connection with towing rafts of logs from his logging operations in the waters of Alaska to mills, I believe, around Juneau, and that in that connection he had looked at Mr. Anderson's vessel."

Due to latent defects in the engine, and due to the hidden condition of the bow of the vessel, this implied warranty of fitness was breached and appellees were entitled to the damages directly flowing from that breach.

Appellants, in their brief, have cited some cases not decided under the Uniform Sales Act where it was held that there is no implied warranty of fitness in regard to the sale of used property. *Perine Machinery Co. v. Buck,* 156 Pac. 20, appellant's brief 49-57; *Smith v. Bolster,* 125 Pac. 1022, appellant's brief 41.

The section quoted above, however, from the Uniform Sales Act has done away with the distinction made in a number of old cases between new and used property. The case of *Tremoli v. Austin Trailer Equipment Co.,* 227 P. 2d 923, 102 Cal. App. 2d 464, holds that under the Uniform Sales Act, an implied warranty of the fitness of goods for the purpose for which purchased extends to latent defects even though the seller is not the manufacturer. In referring to the Uniform Sales Act, the Kentucky Court of Appeals stated in a recent decision:

> "To exclude secondhand goods would be the insertion by the court of an exception from the all-coverage language of the statute itself. We therefore conclude that the statute permits the implication of an implied warranty when the facts exist, or testimony establishing such facts is introduced upon which the statute permits the creation of an implied warranty." *Moss v. Yount,* 296 Ky. 415, 177 S.W. 2d 372. See also *E. Edelman & Co. v. Queen Stove Works,* 205 Minn. 7, 284 N.W. 838; *McKeage Machinery Co. v. Osborne & S. Machinery Co.,* 124 Pa. Sup. Ct. 387, 188 A. 543; *Weber Iron & Steel Co. v. Wright,* 14 Tenn. App. 151; *Durbin v. Durbin,* 106 Or. 39, 210 P. 165; *W. F. Dollen & Sons v. Carl R. Miller Tractor Co.,* 214 Iowa 774, 241 N.W. 307; *O. S. Stapley Co. v. Newby,* 57 Ariz. 24, 110 P. 2d 547; *Drumar Mining Co. v. Morris Ravine Min. Co.,* 33 Cal. App. 2d 492, 92 P. 2d 424.

As long as a written agreement does not specifically negate an implied warranty, parol evidence of the

circumstances giving rise to the warranty is admissible. *Hobart Mfg. Co. v. Rodziewicz,* 189 A. 580; *Mayer Lifeboat Co. v. Isaacson Co. Iron Works,* 212 P. 1054, 123 Wash. 566; *McDonald v. Sanders,* 137 So. 122, 103 Fla. 93. The only writing involved in the subject case was the agreement to take care of the interim period prior to the receipt of a bill of sale for the vessel, which agreement makes no reference whatsoever to the condition of the vessel.

Based on the well accepted rule that the findings of fact of a trial court will be reviewed in the light most favorable to the prevailing party, and to the findings made, it would appear beyond dispute that there was an implied warranty as to the fitness of the vessel and that this implied warranty was breached to the damage of the appellees.

II.

EXPRESS WARRANTIES WERE MADE BY APPELLANTS WHICH WARRANTIES APPELLANTS KNEW OR SHOULD HAVE KNOWN WERE UNTRUE.

Appellants, in their brief, contend that no express warranties were made in regard to the sale of the vessel. They state that "the only evidence on behalf of the plaintiffs as to the alleged misrepresentations or warranties was given by the plaintiff A. E. Owens and by Howard A. Dent, apparently a former business associate of plaintiff". (Appellants' Brief 21.) This ignores the testimony contained in the deposition of Orville A. Mills. (Tr. 414.) The trial court was en-

titled to believe the testimony of Mr. Owens, alone, and under the well established rule on review that the court's findings "will be presumed to be supported by the evidence, which will be viewed in the light most favorable to them" (5 *C.J.S.* 408), there can be no doubt but that express warranties were proved. Moreover, there was really no dispute under any of the evidence as to the giving of these warranties as the essential facts were, in almost every instance, admitted by the appellants or witnesses on their behalf. The applicable statute in regard to express warranties is Remington's Revised Statutes of Washington, § 5836-12, as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

Appellants warranted that the vessel was in good condition except for one scored crankpin, also referred to as a scored bearing or journal, and a slightly bruised forefoot.

In addition to the testimony of Mr. Owens, Mr. Dent and Mr. Mills referred to above, this warranty was admitted by appellants. Mr. Jack C. Anderson, Sr., admitted the following conversation with Mr. Owens:

"I said 'In fair shape with the exception it has got a damaged forefoot and a burnt'—I am trying to think of the name—'journal or crankshaft journal. We had a little difficulty with that and we are anticipating fixing it'." (Tr. 297-298); and

"I told him like this. 'The boat is in a fair condition with the exception of a damaged forefoot and a crankshaft journal, scored crankshaft journal.'" (Tr. 319); and

"Q. And as far as you knew, it was all right except for one crankshaft bearing and for a bruised forefoot; is that right?

A. Damaged forefoot; yes.

Q. And that is what you told Mr. Owens, isn't it?

A. That is right.

Q. And that it was in good condition otherwise?

A. I never made that statement.

Q. You said fair condition?

A. Fair condition." (Tr. 321-322); and

"Q. * * * How much money did you figure it would cost you to put this back in good shape?

A. About five thousand dollars." (Tr. 296-297.)

Appellants' witness George Henry Saindon testified as follows:

"Q. Now did you hear Mr. Anderson tell Mr. Owens that, aside from the one bearing the engine was in good condition?

A. Yes, I did." (Tr. 244.)

The actual condition of the engine was given by the impartial expert witness, Ted Engstrom, who stated that all main bearings were either completely wiped out or the babbitt was cracked with pieces missing. All main bearing journals were scored and approximately one-eighth inch under the original shaft diameter. The water pump was plugged, and the water pump shafts for both the fresh and salt water pumps were bent and the bearings beyond further use. The drive gear had teeth missing and was beyond further use. The crankshaft itself was distorted 3/64ths of an inch. The oil columns through the main bearing webs were packed solid with babbitt the full length, causing total restriction, and the lower base of the engine had been warped considerably due to intensive heat.

The vessel was warranted in good condition aside from the one scored crankpin and a bruised forefoot. A cursory glance at Exhibits 7 and 8 filed with this learned court will reveal the extent of the falsity of this representation. The forefoot was completely demolished, the lower portion of the stem substantially damaged, planks broken, the stem iron almost torn loose and the keel badly damaged. This damage was all below the water line and could not be seen at the time Mr. Owens was shown the boat. (See testimony of Appellants' witness David Eldon Erickson (Tr. 461).)

Moreover, in order to prevent Mr. Owens from becoming suspicious as to the real nature of the damage, the appellants falsely stated that the cause of

the "bruised forefoot" was the striking of a log on the way to Seattle. It is highly significant that, despite the extensive evidence in regard to this affirmation of fact, appellants never denied telling Mr. Owens that the "bruised forefoot" was caused by striking the log. Actually, the evidence indicated that the vessel had run into a rock and had to be backed off. The trial court found:

> "It was proved that instead of striking a log, which would have caused relatively little damage to a tug of this size, the tug had struck a rock, and from the photographs of the bow, plaintiffs' exhibits Nos. 9 and 19, I am convinced that so much damage could not have resulted unless the vessel struck at full speed. The testimony of the defendant Anderson as to this incident was such as to seriously affect his credibility." (Tr. 36.)

It was only after extended cross-examination that Mr. Anderson admitted that the vessel had struck a rock as he apparently wished to justify his warranty to the effect that it had struck a log which of course, if true, would indicate slight damage only. In view of the fact that appellants originally proceeded to Seattle with the intention of repairing the vessel and, after striking the rock, changed their minds and decided to sell it, the evidence in regard to this incident goes further than a mere breach of warranty but indicates the actual perpetration of fraud upon the appellees. The allegation in regard to the striking of a log was a deliberate false statement, obviously made for the purpose of misleading appellees.

Moreover, appellants warranted that the vessel was not leaking. In addition to the testimony of appellants' witnesses, this warranty, as in almost each of the others, was admitted by witnesses of the appellee. Thus appellants' witness Saindon testified:

> "Q. Now, did you hear Mr. Anderson tell Mr. Owens that, aside from that one bearing, the engine was in good condition?
>
> A. Yes, I did.
>
> Q. And did you hear him tell him that the vessel wasn't leaking?
>
> A. Yes, I did." (Tr. 244.)

An inspection of the pictures of the bow of the vessel show that it must have been leaking as stated in the testimony of Mr. Blanchard and Mr. Owens; and the trial court so found. Again it is inconceivable that the appellants did not know that the portion of the vessel forward of the watertight bulkhead was freely taking water from the gaping hole created by running into the rock, although this could not be detected by one making a casual inspection of the vessel.

The final warranty was in regard to the amount of money that would be necessary to repair the vessel. All the evidence was to the effect that $5,000.00 would be adequate. This was even in effect admitted in the pleadings wherein appellants stated in answer to the complaint:

> "Defendants admit that an allowance of five thousand dollars ($5,000.00) was made to plaintiffs by defendants on the purchase price of the vessel by reason of the defects noted in plaintiffs' complaint." (Tr. 11.)

The actual costs of repair were shown to be $27,-487.97, of which sum the trial court found $21,798.68 was required to bring the vessel to the condition warranted.

In the face of this overwhelming evidence of affirmations of fact, appellants seek to have the trial court's findings overruled on the basis that the statements were mere expressions of opinion or seller's praise. When the specific warranties are kept in mind, it is clear that they each constituted an affirmation of fact and promise.

Appellants rely heavily on one case, that of *Getty, et al. v. Jett Ross Mines, Inc.,* 159 Pac. 2d 379. The statement as to the condition of the motor in that case was to the effect that it needed to be repaired. This is quite different from a statement to the effect that it was in first class condition with the exception of the one crankpin. Moreover, in the *Getty* case, "the dragline was shown in the open, under no camouflage whatsoever"; in marked contrast to the subject case where the motor was not torn down so that the parts could be inspected, and the damage to the bow was completely hidden by the water.

Numerous cases hold that statements such as those made in the subject case constitute warranties. In fact, much more general statements have been sustained as the basis for recovery in suits for breach of warranty. Thus, in the case of *Harrigan v. Advance Thresher Co.,* 81 S.W. 261, 26 Ky. 317, a statement that an enginne was "all right, in good condition"

was held to constitute an express warranty. Similarly, where a secondhand ruling machine was sold and the seller stated that it was in good order, the buyer was allowed to recover for breach of warranty when defects were discovered. *Latham v. Shipley,* 86 Iowa 543, 53 N.W. 342. In *French v. Hardin County Canning Co.,* 67 Ill. App., p. 269, the statement "understand, we quote you only as cans that are well made, tested and in every way satisfactory for your work", was held to constitute a warranty. In the case of *Curby v. Masterbrook,* 288 Mich. 676, 286 N.W. 123, a sale was made of an automobile "as is". The court held:

> "We hold only that a dealer cannot represent a car to be in 'perfect condition' where he does not have the knowledge of the condition which he professes, without assuming the risk of injuries proximately caused by such misrepresentation. Such decision requires only that if a dealer sells used cars 'as is', he should not tell his customers that they are without defects."

In *Saunders v. Cowl,* 277 N.W. 12, the statement that a tent was "in good condition" was held to constitute a warranty and, similarly, in *Boos v. Claude,* 69 S.D. 254, 9 N.W. 2d 262, a statement that a car was in "perfect condition" was made the basis for recovery by the buyer on a suit for breach of warranty.

The cases of *Smith v. Bolster,* 125 P. 1022, and *Lent v. McIntosh,* 186 P. 2d 626, cited by appellants hardly appear pertinent. The *Smith* case was decided long before the Uniform Sales Act was adopted in the

State of Washington and, consequently, has been changed by the statutory enactment in regard to express warranties quoted supra. Moreover, the case as cited does not indicate what defective conditions were present so that it may not be compared with the subject situation.

Lent v. McIntosh, a more modern case, is readily distinguishable from the case at bar as the agreement in the *Lent* case expressly provided:

> "Purchaser agrees that he has examined the property here described and is using his own judgment as to its condition, fitness and value, that the seller makes no representation, statement, warranty or guaranty as to its condition, or with reference to said property; that the execution of this contract is not procured by any statement, representation or agreement not herein contained, and that each and every condition and agreement relative to the subject matter of this contract is contained herein."

It is thus apparent that five express warranties were made in the subject case, namely:

1. That the vessel was in good condition except for one scored crankpin, also referred to as a scored bearing or journal; and

2. A slightly bruised forefoot;

3. That the forefoot was bruised as aforesaid by striking a log on the trip from Alaska to Seattle;

4. That the vessel was not leaking; and

5. That an expenditure of $5,000.00 would put the vessel in good condition.

All of these warranties were proved to be false and, moreover, in regard to all of them, there is good reason to believe that appellants knew they were false when made.

III.

APPELLEES PURCHASED THE VESSEL IN RELIANCE ON THE REPRESENTATIONS OF APPELLANTS, WHICH REPRESENTATIONS HAD THE NATURAL TENDENCY TO INDUCE APPELLEES TO PURCHASE THE VESSEL.

In his opinion, the learned trial judge stated:

> "I find that the tug was not sold 'as is' but upon the express warranty that it was tight and in fit condition with the exceptions noted; and that this warranty was made with the intent that the plaintiffs should rely, and that plaintiffs bought the tug in reliance, thereon. I also find that although Owens examined the vessel, it was not, nor could it have been, such an 'examination as ought to have revealed' (Sec. 15 (3) Uniform Sales Act), the internal defects in the motor and the under water damage to the hull." (Tr. 39.)

Misrepresentations such as those made by the appellants discussed above could not but have a natural tendency to induce a buyer to purchase the vessel. These misrepresentations go to the very essence of the condition of the vessel. They were made in regard to conditions not readily apparent. The condition of the engine could only be determined by taking it apart (Tr. 142, 114, 115.) Also, Mr. Mills testified that just until the vessel was placed in dry dock.

Mr. Owens testified that the reason that he purchased the vessel was because of these representations. (Tr. 142, 114, 115.) Also, Mr. Mills testified that just prior to the consummation of the sale,

> "I inquired of Mr. Owens whether he had fully inspected the vessel, or had any competent marine engineers inspect it. He informed me that he had not, and he engaged in some side conversation with Mr. Anderson with reference to the vessel, the only portion of which I noted being an assurance by Mr. Anderson that the vessel was as represented, and that they could proceed to close the transaction at that time." (Tr. 410.)

It is true that Mr. Oaksmith, a witness for appellants, testified that in the month of March he spoke to Mr. Owens and attempted to persuade him to purchase another similar vessel for $35,000.00, and that he mentioned to Mr. Owens that there had been trouble with the crankshaft of the TP 100. He specifically mentioned that the vessel had a burned out bearing. Aside from the fact that any such statement from one attempting to sell another vessel would naturally be regarded as merely an effort to run down a rival's ship, the only statement of fact was the very one which the Andersons had previously told Mr. Owens; namely, that there was trouble with one bearing. (Tr. 273.) It is little wonder that such a conversation had no effect in altering Mr. Owens' plans to purchase the boat on the basis of the appellants' representations, and was not remembered four years later.

It is further significant that this conversation in no way put Mr. Owens on warning as to the bow of the vessel or in regard to the other substantial defects. It is extremely common for a competitor to run down a rival's product, and naturally Mr. Owens placed little significance on this conversation, especially in view of the fact that he had been apprised by the appellants of the one defective bearing.

The appellants apparently contend he was motivated in buying the ship entirely by its price. Certainly, however, if the vessel were not misrepresented so as to induce him to purchase it, he would not have paid $25,000.00 for it and then incurred an additional $27,487.97 in repairs, almost all of which would have had to be paid prior to using the vessel; when a similar ship without those defects could have been obtained for $35,000.00. (Tr. 273.) This would be especially true if the amount or manner of paying the purchase price were the prime considerations. It is well known that shipyards will not readily release vessels after repairing them unless payment is made. The checks introduced in evidence further indicate that the payments had to be made prior to release of the vessel.

There can be no doubt but that the sale was induced by reliance upon the gross misrepresentations of the defendants.

IV.

ORAL EVIDENCE IN REGARD TO THE EXPRESS WARRANTIES MADE BY APPELLANTS WAS PROPERLY ADMITTED.

Appellants now contend that oral evidence in regard to the express warranties referred to in this brief was inadmissible. No objection was made at the time that this evidence was introduced and, in fact, much of the evidence was adduced from appellants' own witnesses. A casual reference to the parol evidence rule was included in appellants' motion for judgment at the conclusion of appellees' direct evidence, but no motion was ever made to strike this evidence and objection was not taken to its introduction.

> "As a general rule, unless the evidence has been rendered absolutely inadmissible by statute, or it is of such character that its ill effects could under no circumstances have been obviated in the court below, the admission of evidence which has not been properly objected to in the trial court will not be reviewed, although due exception has been taken." 4 *C.J.S.* p. 561. See cases cited 4 *C.J.S.*, p. 566, Note 65.

The above stated general rule is the law in the State of Washington, *Miller v. Sheane, et al.* (Sup. Court of Washington), 206 P. 913, 120 Wash. 227.

Regardless of the fact that no objection was taken to the introduction of this evidence, nor was any motion made to strike it, the evidence was admissible under the circumstances involved. The trial court found:

> "The agreement was executed on April 1, but the agreement not only does not even refer to the condition of the tug, but its purpose apparently was to provide for immediate transfer of possession pending receipt of a bill of sale from the army, which was a prerequisite to documentation." (Tr. 35.)

It was not intended to be a complete statement of all the agreements between the parties. This is made additionally clear by the fact that the agreement makes no mention of the circumstance that the estimate for repairing the vessel was $5,000.00, although this circumstance is set forth in the appellants' answer to the complaint. (Tr. 11.) Appellants contend that the written agreement should be construed against appellees since it was prepared by an attorney for the appellees. The case cited in that connection, *White v. Eagleson,* 193 F. 2d 567, concerns a situation involving patent ambiguities in a written instrument prepared by one of the parties. The court held that such an ambiguity would be resolved against the party preparing the instrument. In the subject case, there is no ambiguity involved. The terms of the written agreement are clear and not in dispute. The agreement, however, does not purport to be the complete understanding between the parties. No reference to warranties is made therein and oral evidence is permissible under those circumstances. Moreover, the evidence indicates that the contract was examined by attorneys on behalf of the appellants. (See Tr. 424-425.)

Were it not for the oral testimony in regard to the $5,000.00 allowance for repairs, this item would not be deductible in determining the damages of the appellees due to the breach of the implied warranty of fitness of the vessel.

Appellants cite two cases in support of their contention that the express warranties were inadmissible under the parol evidence rule and, in addition, appellants quote from Vol. 20, Amer. Juris. at p. 958, in regard to the general principle that where there is a complete contract, prior parol agreements are merged in the written agreement. This same work, however, states in Section 1135:

> "A well settled exception to the parol evidence rule exists where the entire agreement has not been reduced to writing—that is, where there is what a learned writer in the law of evidence calls 'a partial integration'. In such a case, to prove the part not reduced to writing is admissible, although it is not admissible as to the part reduced to writing."

To the same effect, it is stated in 32 *C.J.S.*, p. 998, that:

> "In accordance with the rules stated supra, 997-1002, as to the admissibility of parol evidence of a collateral undertaking not in conflict with a writing which it is apparent does not cover the entire transaction or define the obligations of both parties, evidence of a parol prior or contemporaneous agreement connected with a sale of personalty may be admissible. Thus evidence has been admitted to show * * * that there was

an oral warranty with respect to the articles sold."

In the case of *Titan Truck Co. v. Richardson,* 210 P. 790, 122 Wash. 452, the Supreme Court of Washington held that oral evidence of an express warranty was admissible despite a written conditional sales contract setting forth all the terms of payment and reservation of title, stating:

"The contract of sale was given to complete the contract between the parties and did not purport to, and did not, contain any of the terms of the sale except those provisions as to the payment of the notes and the reservation of title, and any evidence introduced as to an express warranty upon which the sale was made was in no wise a variance of the terms of the conditional contract of sale. * * * 'Without going into extended reasons, I am rather of the opinion that the contract offered in evidence (being the conditional contract of sale) and relied upon is a contract simply for the payment of money that is due rather than a contract of sale.' In other words, this written contract is principally a memorandum of the terms of payment and was not such a written contract as those referred to in the cases relied on by the appellant, and to which we have just above referred." See also *H. E. Gleason v. Carman,* 187 P. 329, 109 Wash. 536; *B. F. Goodrich Co. v. Hughes,* 194 So. 842, 239 Ala. 373; *Rosenburg v. Capital Cut Stone & Granite Co.,* 238 P. 330, 28 Ariz. 505; *Linograph Co. v. Bost,* 24 S.W. 2d 321, 180 Ark. 1116; *Walnut Creek Milling Co. v. Smith Bros. Co.,* 174 S.E. 255, 49 Ga. App. 116; *Sorensen v. Webb,* 214

P. 749, 37 Idaho 13; *National Cash Register Co. v. Foerster,* 16 N.E. 2d 160, 296 Ill. App. 640; *Stewart v. Clay,* 123 So. 158, 10 La. App. 727; *Edgerton v. Johnson,* 7 S.E. 2d 535, 217 N.C. 314; *Continental Fibre Co. v. B. F. Sturtevant Co.,* 116 A. 533, 273 Pa. 30; *Yancey v. Southern Wholesale Lumber Co.,* 131 S.E. 32, 133 S.C. 369.

In the case of *V. Valente, Inc. v. Mascitti,* 295 N.Y. Supp. 330, a radio was sold upon the representation "You can get any station in Rome and clear." Thereafter, a formal written contract was entered into which contained no warranties. The court laid down the following criteria in determining whether oral testimony is admissible in regard to express warranties in the absence of any mention of warranties in a written contract:

> "Upon the sale of personal property evidenced by a written agreement, complete on its face, an oral warranty as to the subject-matter of the sale may be shown by parol, where: (1) The written agreement, by its terms, does not state or clearly imply that it contains the whole contract; (2) the oral warranty does not change or contradict the terms expressed, as where, though not necessarily, the writing contains the obligations of but one party to the sale, e.g., the seller; and (3) the entire agreement was reached orally before the writing was signed and but a part thereof was incorporated in the writing."

All of the contentions set forth above are to be found in the subject case and clearly the oral testimony was admissible.

The two cases cited by appellants in objection to this general rule are not at all applicable. *Fairbanks Steamshovel Co. v. Holt & Jeffery,* 140 P. 394, involved a written contract including an express warranty that a certain steamshovel was "in first class shape". The court held that there was a breach of this warranty but refused to permit oral testimony as to other express warranties since the contract quite obviously included in its express terms a provision in regard to warranties. The other case cited by appellants is that of *Garrett v. Ellison,* 72 P. 2d 449, wherein the court permitted oral testimony to show that one named in a note as one of the payees had no beneficial interest in the note and mortgage. The court continued with some dictum in regard to the fact that parol evidence is inadmissible to contradict the terms of a written instrument. We fail to see where the case is in point.

The oral evidence of the express warranties was admissible not only in regard to the breach of the warranties but on the basis of showing fraud. There are eight essential elements of actionable fraud (37 *C.J.S.* 215), all of which have been proved in the subject case. Thus the evidence indicates that (1) there were representations made by the appellants; (2) the representations were false; (3) the representations were material; (4) the appellants knew of the falsity of the representations; (5) they intended that the representations should be acted upon by the appellees; (6) Mr. Owens was ignorant of the falsity of the representations; (7) he relied on the truth of ap-

pellants' representations; and (8) he had a right to rely thereon.

Oral evidence is always admissible to prove fraud in the inducement of a contract.

> "Parol evidence is admissible to show that a written instrument was induced by fraud, even though the writing recites that all agreements between the parties are contained therein or provides that no verbal agreements or representations affecting its validity will be recognized; * * *" 32 *C.J.S.* 942.

This principle of law was upheld by the Supreme Court of Washington in the case of *Producers' Grocery Co. v. Blackwell Motor Co.,* 212 P. 154, wherein oral evidence was permitted despite a contract expressly stating that the seller would not be bound by any representations not contained therein. A car was sold upon the oral representation that it was a 1920 model which had been run 4,000 miles when in fact it was a 1919 model which had been run 10,000 miles.

Similarly, in *Marion S.S. Co. v. Aukamp,* 172 Wash. 455, 20 P. 2d 851, the Supreme Court of Washington upheld the introduction of oral testimony to the effect that the seller represented that a used steamshovel "would work just as well as a new shovel" and that it had been thoroughly overhauled. Subsequently, a written contract of sale was entered into, but nevertheless it was held that the buyer could proceed on the basis of the oral representations either in an action for damages or suit to rescind the contract.

Similarly, in the case of *Champlin v. Transport Motor Co.* decided by the Supreme Court of Washington and reported in 33 P. 2d 82, oral evidence as to false representations made to induce the purchase of a car were held admissible despite a written contract of sale stating: "No warranties, representations or agreements have been made by the seller unless specifically set forth herein." The purchaser was awarded damages based on the false representations.

Thus, in the case at bar, the oral evidence as to the express warranties was admitted into evidence without objection and without any motion to strike ever having been made; it did not contradict the written contract which was not a complete agreement; and, further, was admissible to prove the fraudulent representations pleaded in appellees' complaint.

V.

PROMPT NOTIFICATION WAS GIVEN TO THE APPELLANTS OF THE BREACHES OF WARRANTY UPON THE DISCOVERY OF THEM.

The evidence indicates that the vessel after its purchase in the first of April, was removed to the Stikine Fish Company dock. Thereafter, work was commenced on the defective bearing. Subsequently, further investigation revealed additional damage to the engine and it was deemed necessary to remove the crankshaft. It was not until this crankshaft had been removed and placed on a lathe by the Fairbanks-

Morse & Company that the fact that it was unusable, and the extensive damage to the vessel, became apparent. This, as well as the removal of the vessel to dry dock where the damage to the bow of the vessel was ascertained, took place in May. Mr. Owens, who was at his logging camp in Alaska, was called to Seattle when this extensive damage was ascertained and his attorneys, at his request, wrote to the appellants informing them of the discoveries made by Mr. Owens and of the various misrepresentations made in regard to the sale of the vessel. See letter of May 17, 1947. (Tr. 348.) It is further significant that the $5,000.00 down payment had been made to the appellants on April 22, 1947, prior to the discovery of the extensive damage and that the appellees had become obligated on a promissory note and mortgage to the First National Bank of Anchorage for the balance of the purchase price.

The case of *Suryan v. Lake Washington Shipyards* decided by the Supreme Court of Washington June 22, 1931, 300 P. 941, is quite similar to the case at bar. The plaintiff purchased a vessel from the defendant. While fishing in Alaskan waters on June 12, 1928, a leakage developed and the boat was towed into port where temporary repairs were made. "On August 14, 1928, while fishing was still in progress, the plaintiff, in answer to a request for payment on account of the balance due for the construction of the boat, sent a telegram which reads as follows: 'Sorry can not help out now Fishing very poor Hardly making expenses Stop Do not think addi-

tional charges fair as part of stern of boat was not caulked and we almost lost boat and lives with a load.' " After the fishing season closed, a survey was made of the vessel and, on October 20, 1928, for the first time, demand was made upon the defendant for damages due to the breach of the implied warranty of seaworthiness. The court held that the telegram of August 14th, together with the letter of October 20, constituted timely notice under the provisions of the *Uniform Sales Act,* Sec. 5836-49, Rem. 1927 Supp., providing:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

It is to be noted that, in the *Suryan* case, the first notice of a claim for damages was made on October 20th, over four months after the damage was ascertained, and the initial telegram was more than a month after the leakage occurred. By contrast, the notice given in the subject case was extremely prompt and certainly complies with the statutory requirements.

VI.

THE LEARNED TRIAL COURT CORRECTLY APPLIED THE LAW IN DETERMINING THE AMOUNT OF DAMAGES.

Appellants contend that the court erred indetermining the amount of damages awarded to appellees for the false representations made by appellants. Section 5836-69 of *Remington Revised Statutes of the State of Washington* provides:

> "(6) Measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
>
> (7) In the case of breach of warranty, of quality, such loss, in the absence of special circumstances showing proximated damage of a greater amount is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty."

The trial court used this exact basis in determining the damages to be awarded to the appellees. It determined the reasonable cost of the repairs necessarily expended in restoring the vessel to a fair condition, and concluded that $16,798.68 was the difference between the value of the vessel at the time of delivery to the buyer and the value it would have had if it had answered the warranty. When the sum of $16,798.68 is deducted from the purchase price of $25,000.00, it would indicate that the vessel had a value of $8,211.32 at the time of its sale to the appellees. This would appear most generous in view

of the fact that appellants had paid $10,000.00 for it the year previous and, in the meantime, had practically demolished the bow as well as further damaging the engine.

In any event, the use of repair costs in determining damages for breach of warranty is generally accepted.

> "Where the buyer keeps and uses the property and by the exercise of reasonable expenditures has made the article conform to the warranty, the amount of such expenditure has been held to measure the buyer's damages and may be recovered in lieu of the difference between the actual value of the article and its value if it had been as warranted and it has been held in some cases that the reasonable costs of putting an article in the condition warranted represents this difference in value." 77 *C.J.S.* 1328.

In the case of *Moss v. Yount,* cited supra, it was stated in regard to the assessment of damages under the Uniform Sales Act:

> "We think the court was in error in treating defendant's counterclaim as a sham plea, or that the evidence disclosed it as such, to the extent of *defendant's expenditures in trying to repair the tractor,* and the loss of time (including idleness of his employed force while making such reasonable efforts to repair), since such items are clearly the direct result of the defective condition of the tractor.
>
> Defendant—if there existed either an express or implied warranty—was thereby authorized

to make reasonable efforts to restore the purchased article to a condition where it would serve the purpose for which it was bought and intended to be appropriated by him, and his expense while making such reasonable effort, would become the proximate result of a breach of either the express or implied warranty, if one existed." See also *National Sheet Metal Co. v. McKenzie,* 8 S.E. 2d 93, 62 Ga. App. 292; 55 *C.J.,* p. 881, notes 77, 78; *Acme Brick Co. v. Hamilton,* 238 S.W. 2d 658, 218 Ark. 742; *Spero Elec. Corp. v. Wilson,* 71 N.E. 2d 827, 330 Ill. App. 622; *Cobb v. Truett,* 11 So. 2d 120; *American Laundry Mach. Co. v. Blecher,* 152 S.W. 853; *Stillwell etc. Mfg. Co. v. Phelps,* 130 U.S. 520, 32 L. Ed. 1035.

In the last cited case, the Supreme Court of the United States held:

"The rule of damages adopted by the court below, of deducting from the contract price the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract, is the only one that would do full and exact justice to both parties and is in accordance with decisions upon similar contracts."

Similarly, in the subject case, the court adopted the only measure of damages that would do substantial justice between the parties. The vessel was purchased on the basis that it would need certain repairs and that these repairs could be effected for $5,000.00. The repairs were immediately undertaken by competent mechanics and ship carpenters. If the

vessel had answered the warranties it would have been repaired for $5,000.00 Appellees' actual costs were shown to be $27,478.86. The court, in determining the damages, resolved all doubts in favor of the appellants, disallowing the items for repairs of the tail shaft, stuffing box, battery plates, copper painting the vessel and the work performed by appellees' employees other than Mr. Blanchard; concluding that $21,798.68 was necessarily spent in restoring the vessel to the condition warranted.

Evidence by expert witnesses as to the difference between the value of the vessel at the time of its delivery to the appellees and its value if it had answered to the warranties could not have been as accurate in determining that difference as the actual costs involved in bringing the vessel up to the condition warranted, especially in view of the fact that the contract was entered into on a basis that the vessel would be repaired and that the repairs could be made for the sum of $5,000.00.

The cases cited by appellants in regard to their contention that the only testimony admissible to show the damages would be that as to the value of the boat without regard to the costs of repairs do not sustain their contention. Thus, in the case of *Fairbanks Steam Shovel Co. v. Holt & Jeffery* (Sup. Ct. of Wash., 1914), 140 P. 394, a steamshovel warranted to be in "first class condition" was found to have a defective boom some five and one-half months after its sale. The measure of damages was determined on the basis

of the cost of replacing the defective boom. The buyer introduced evidence as to the actual cost of the boom, $2,369.88. There was also testimony to the effect that the cost of a new boom would not exceed $843.00. "As between these sums the court arbitrarily allowed the sum of $1,000.00." This was upheld by the Supreme Court of the State, although apparently no evidence was introduced as to the difference in value of the steamshovel at the time of its sale if it had answered the warranty and if it had not. In other words, the court evaluated the evidence as to the costs of repairing the shovel to the condition which it was warranted in exactly the manner followed by the learned trial judge in the subject case.

The case of *Burnley v. Shinn,* 141 P. 326, cited by appellants, involved a suit for rescission of the sale of a car after it had been damaged due to the fault of the purchaser. Quite obviously repair costs would be inapplicable in that situation and no evidence was introduced upon which the court could award damages.

Perine v. Buck, 156 P. 20, involved the sale of an impeller which was installed in a used pump by the purchaser. The court quite properly held that the cost of repairs of the pump which was not a part of the sale could not be used as a basis of damages.

Abrahamson v. Cummings (Wash.), 117 P. 709, and *Denver Horse Importing Co. v. Shaefer* (Colo.), 147 P. 367, involved the sale of horses and, of course, the question of applying the costs of repairing an article to meet its warranted condition was not involved.

The case of *Fryburg v. Brinck,* 12 P. 2d 757, involved a counterclaim by the purchaser of a radio upon the basis that it did not comply with the warranty. The purchaser requested an instruction to the effect that the balance of the purchase price would not have to be paid due to the defect. The court held that this was not a correct measure for damages due to the presence of a warranty. As dictum, the court stated that the measure of damages was the difference of market value as warranted and the market value in view of the defects. The case, however, quite apparently does not come under the Uniform Sales Act which applies the rule for damages quoted in the extract from Remington Revised Statutes of the State of Washington and cited supra.

Likewise, the case of *In re Buswell's Estate,* 22 P. 2d 317, is not in point as it involves a shipment of lumber not conforming to representations. As in the case involving sales of horses, cost of repairs could not be used as an indication of the difference between the value of the goods at time of delivery and the value they would have had had they answered the warranty.

Appellants also contend that the court erred in refusing to admit evidence as to whether appellees had sold the vessel in 1950, two years after the date of the purchase of the vessel. The court quite properly considered that such evidence was too remote to throw any light on the question of the value of the vessel at the time of its delivery to appellees, which is the proper measure of damages in such cases. The

court found that repairs in addition to those necessary to place the vessel in the condition warranted had been made, and to permit evidence of resale over two years later would involve so many intervening factors, such as additional work performed on the vessel and changes in market conditions, would not throw any light on the material question in regard to damages, namely, the relationship of the value of the vessel at the time of delivery to the buyer as compared with the value it would have had at that time had it answered the warranties.

Appellants further question the award of $500.00 damages for the wrongful appropriation by the appellants of appellees' 18 ft. steel lifeboat. Mr. Owens testified that the boat was worth $1,000.00. (Tr. 119.) Mr. Oaksmith, appellants' witness, testified it had a value of $300 to $400 as a used lifeboat although it would be worth $1,000.00 new. (Tr. 281, 282.) It certainly was within the trial court's province to determine the damages due to the failure to return the lifeboat to be $500.00.

The court also awarded damages for the loss of the use of the vessel. This damage resulted directly from the breach of warranty and it is well settled that, upon adequate proof, damages are allowable for loss of profits in cases of misrepresentation.

> "Under the rule discussed supra, Sec. 374, that the buyer may recover all his damages on a breach of warranty by the seller, a buyer sustaining damages is not prevented from recovering anticipated profits merely because they are such.

> Hence, prospective profits may be recovered where they have naturally resulted from the breach, provided they are not too remote, speculative, or uncertain." 77 *C.J.S.,* Sec. 379.

Mr. Owens testified that his logging camp at Menafee Inlet produced 7,500,000 feet of logs during the period that the vessel was delayed due to the breach of warranties made by the appellants. He stated that had the vessel been available, 5,500,000 feet would have been delivered by him at a price of $4.00 per thousand. This price was actually paid for the delivery of the logs and, had appellees had the vessel available, they could have received that price for so delivering them. Mr. Owens estimated the profit which he could have made had the vessel been available at $11,000.00. (Tr. 116 and 117.) Of this sum the court allowed $7,733.33.

The testimony in regard to the loss of profits was specific and based on actual logs produced and available for delivery. The appellants had ample opportunity to cross-examine as to the basis for Mr. Owens' computations as to loss of profits which detailed testimony would not have been proper on direct examination. The testimony stands uncontradicted and unshaken.

The old case of *Puget Sound Iron & Steel Works v. Clemmons,* 72 P. 465, decided by a split court and cited by appellants to the effect that loss of profits may not be recovered, does not constitute any authority under the Uniform Sales Act. The allowance for

loss of profits under a situation somewhat analogous to that at bar was allowed by the Supreme Court of the State of Washington in the case of *Suryan v. Lake Washington Shipyards,* 300 P. 941, cited supra. In that case, a vessel was sold to the plaintiff who used it for fishing in Alaskan waters. On June 12, 1928, the vessel developed a leakage and was towed into port where temporary repairs were made. The court held:

> "The defendant knew that the boat which it constructed for the plaintiff was intended for use as a fishing boat in Alaska waters during the herring season of 1928; knew that the fishing season for herring in those waters was limited; and must have contemplated that, if the boat proved unseaworthy through its faulty construction, it might become necessary, when stress of weather arose, to jettison the cargo and seek aid in order to save the lives of the crew and bring the helpless boat into port. So far as concerns the allowance for loss of profits during the time the boat was laid up for necessary repairs, as awarded by the trial court on item 1, it is sufficient to say that this court is committed to the doctrine that, in such a case as this, prospective profits may be the basis of recovery if they can be estimated with reasonable certainty. *Florence Fish Co. v. Everett Packing Co.,* 111 Wash. 1, 188 P. 792, 796; *Warner v. Channell Chemical Co.,* 121 Wash. 237, 208 P. 1104; *Goldstein v. Carter,* 157 Wash. 405, 288 P. 1063; *Watson v. Gray's Harbor Brick Co.,* 3 Wash. 283, 28 P. 527."

Similarly, in the subject case, appellants knew that the vessel was to be used by appellees in their logging

operation in Alaska; that logs could be towed in Alaska for a limited period of time only; and that, if the vessel did not comply with the warranties, the delay necessitated in repairing it so as to bring it up to its warranted condition would result in loss of profits.

CONCLUSION.

The evidence in this case revealed, and the learned trial court found, that appellants both impliedly and expressly warranted the condition of the vessel TP 100 at the time of its sale to appellees. Appellants were informed of the nature of appellees' business and the purpose for which they desired the vessel. The representations made by the appellants were false and, in most respects, were made by the appellants with the knowledge of their falsity, for the purpose of inducing appellees to purchase the vessel. Appellants represented that the vessel was in good condition except for one crankshaft bearing and a bruised forefoot. They represented that the bruised forefoot was caused by striking a log while proceeding from Alaska to Seattle when, in fact, they well knew that the vessel had forcibly run into a rock, practically demolishing the bow, which damage could not be seen during a casual inspection of the vessel due to the fact that it was below the murky water line of Lake Union.

The engine, instead of being in good condition aside from the one defect noted, had in effect been burned

out, the damage not being visible without tearing the engine down. It was shown that all main bearings were either completely wiped out or the babbitt was cracked with pieces missing; all main bearing journals were scored and approximately 1/8th of an inch under the original shaft diameter. The water pump was plugged. Teeth were missing from the drive gear and the gear was beyond further use. The shafts of the fresh and salt water pumps were bent and the bearings were beyond further use. The crankshaft itself was distorted 3/64ths of an inch, being warped so as to be unusable. The oil columns were packed solid with babbitt the full length, and the base of the engine, due to the intensive heat, had been warped. Although this damage, with the exception of the one crankpin which had been hung up, was not readily visible, the appellants, with their intimate knowledge of the vessel, must have known of the engine's actual condition at the time that they represented it to be in good condition with the exception of the one crankpin.

Appellants further warranted that the vessel was not leaking although they must have known that the forward portion of the vessel ahead of the water-tight bulkhead was taking water freely. Appellants also stated that the vessel could be placed in first class condition by an expenditure of $5,000.00, which representation also was untrue. The trial court assessed the damages on the basis of the difference in value of the vessel at the time of delivery to the buyer and the value that it would have had if it had answered

to the warranties. The trial court also allowed damages for loss of profits which directly and naturally resulted from the breaches of warranty.

It is respectfully submitted that the judgment of the learned trial court should be affirmed.

Dated, Juneau, Alaska,
October 24, 1952.

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